91-326

Supreme Court, U.S.
FILED
AUG 5 - 1991
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP and DOUGLAS L. CARTER,

Plaintiffs-Appellants-Petitioners,

-vs-

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,

Defendants-Appellees-Respondents,

and

UNITED STATES OF AMERICA,

Substituted Defendant-Appellee-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Bruce F. Ehlke,
Attorney of Record
LAWTON & CATES, S.C.
214 West Mifflin Street
Madison, Wisconsin 53703
(608) 256-9031

Attorney For Hamrick, Grosz, Fischer, Filip and Carter

QUESTION PRESENTED FOR REVIEW

Do the provisions of 28 U.S.C. Sec. 1346(b) and 28 U.S.C. Sec. 2679(d) apply to actions in which it has been alleged that an employee has committed an intentional tort such as a ". . . libel . . . or interference with contract rights . . .", notwithstanding that 28 U.S.C. Sec. 2680 expressly states that the "provisions of [28 U.S.C. Secs. 2671 through 2680] and section 1346(b) of this title shall not apply to" such actions?

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS M. HAMRICK, RANDALL D. GROSZ, IAN L. FISCHER, BRANT G. FILIP and DOUGLAS L. CARTER,

Plaintiffs-Appellants-Petitioners,

-vs-

ALLEN R. FRANKLIN, NATHAN L. GERATHS and RAFAEL MARTINEZ,

Defendants-Appellees-Respondents,

and

UNITED STATES OF AMERICA,

Substituted Defendant-Appellee-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is the petition of Thomas M. Hamrick, Randall D. Grosz, Ian L. Fischer, Brant G. Filip and Douglas L. Carter for a writ of certiorari to review the opinion, order and judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ..... —

TABLE OF CONTENTS AND AUTHORITIES CITED i

OPINIONS DELIVERED IN COURTS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR ALLOWANCE OF THE WRIT 4

I. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS CONTRARY TO THE UNAMBIGUOUS MANDATE OF 28 U.S.C. SEC. 2780 4

II. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE PURPOSE OF THE FEDERAL TORT CLAIMS ACT, AS WELL AS INCONSISTENT WITH THE LEGISLATIVE INTENTION BEHIND 28 U.S.C. SEC. 2679 6

III. THE DECISION OF THE COURT OF APPEALS IN THIS CASE RELIED ON CASE LAW THAT DOES NOT APPLY HERE. 9

CONCLUSION 11

AUTHORITIES CITED

Cases

Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989) 6

Bell v. City of Milwaukee, 536 F. Supp. 462 (E.D. Wis. 1982) 7

Graham v. Sauk Prairie Police Commission, 915 F.2d 1085 (7th Cir. 1990) 7

Hibma v. Odegaard, 769 F.2d 1147 (7th Cir. 1985) 7

Mitchell v. Carlson, 896 F.2d 128 (5th Cir. 1990) 6

Nasuti v. Scannell, 906 F.2d 802 (1st Cir. 1990) 6

Newman v. Soballe, 871 F.2d 969 (11th Cir. 1989) 10

Pelphrey v. United States, 674 F.2d 243 (4th Cir. 1982) 10

Powers v. Schultz, 821 F.2d 295 (5th Cir. 1987) 10

Smith v. Marshall, 885 F.2d 650 (9th Cir. 1989) 10

United States v. James, 478 U.S. 597 (1986) 5

United States v. Smith, 111 S.Ct. 1180 (1991) 9, 10, 11

Westfall v. Erwin, 108 S.Ct. 580 (1988) 7

Statutes

10 U.S.C. Sec. 1089 9
10 U.S.C. Sec. 1089(c) 9, 10

28 U.S.C. Sec. 1254(1) 1
28 U.S.C. Sec. 1291 4
28 U.S.C. Sec. 1346(b) 1
28 U.S.C. Sec. 1441(a) 3
28 U.S.C. Sec. 1442 3
28 U.S.C. Sec. 2401(b) 3
28 U.S.C. Sec. 2671 ..... 1, 4, 5, 10
28 U.S.C. Sec. 2675 3
28 U.S.C. Sec. 2679 ..... 6, 7
28 U.S.C. Sec. 2679(d) 1, 3
28 U.S.C. Sec. 2679(d)(1) 5, 8, 9, 10, 11
28 U.S.C. Sec. 2680 ..... 2, 4, 5, 10, 11
28 U.S.C. Sec. 2680(h) 5, 7, 8, 10, 11
28 U.S.C. Sec. 2680(k) 10
28 U.S.C. Ch. 171 4

Other Authorities

Public Law 100-694 ..... 7, 8

House Report No. 100-700 (June 14, 1988) 8

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported at 931 F.2d 1209 (7th Cir. 1991); it also is printed in the appendix to this petition at App. 101. The opinion of the United States District Court for the Western District of Wisconsin has not been published; it is printed in the appendix to this petition at App. 108.

JURISDICTIONAL STATEMENT

The opinion, order and judgment of the Seventh Circuit Court of Appeals sought to be reviewed were dated and entered May 8, 1991. App. 101. The statutory provision believed to confer jurisdiction on the Supreme Court to review this case is 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The statutes of the United States that are involved in this case are, in pertinent part, as follows:

28 U.S.C. Sec. 1346(b).

"Subject to the provisions of chapter 171 of this title [28 U.S.C. Secs. 2671 through 2680], the district courts, together with the United States district court for the District of the Canal Zone and the district court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. Sec. 2679(d).

"(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

". . . .

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions . . . ."

28 U.S.C. Sec. 2680.

"The provisions of this chapter [28 U.S.C. Secs. 2671 through 2680] and section 1346(b) of this title shall not apply to—

". . . .

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . ."

STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint with the State of Wisconsin Circuit Court for Dane County on January 12, 1989. The causes of action alleged in the Complaint are grounded in the state common law torts of libel and intentional interference with employment contract rights. Each of the Plaintiffs, Thomas Hamrick, Randall Grosz, Ian Fischer, Brant Filip and Douglas Carter, is a former employee of the

Veterans Administration Hospital in Madison, Wisconsin. App. 114-115.

Three individuals — Allen Franklin, Nathan Geraths and Rafael Martinez, each of whom is or was an employee of the same Hospital, are named as Defendants in the action. The Complaint against them alleges that, acting in bad faith, with an improper motive and outside the lawful scope of their employment, and for personal reasons unrelated to the lawful duties and responsibilities of their employment at the Hospital, the Defendants libeled and otherwise intentionally interfered with the employment of the Plaintiffs.[1] App. 114-117.

On January 27, 1989 the three individually named Defendants filed a Petition for Removal to District Court with the State Circuit Court, relying on 28 U.S.C. Secs. 1441(a) and 1442 for removal of the lawsuit to the United States District Court for the Western District of Wisconsin. On February 7, 1989 the same three Defendants filed a Motion to Substitute United States of America as Sole Defendant, and Motion to Dismiss with the District Court.

On March 22, 1989 the District Court entered an Order, granting the Motion to substitute the United States as the sole Defendant in the action, relying on 28 U.S.C. Sec. 2679(d), and further granting the individual Defendants' Motion to dismiss the action. The District Court granted the individual Defendants' Motion to Dismiss on the basis that the Court lacked subject matter jurisdiction, because the Plaintiffs had not presented an administrative claim against the Federal Government, as required by the Federal Tort Claims Act at 28 U.S.C. Secs. 2401(b) and 2675, before commencing their lawsuit against Franklin, Geraths and Martinez. The District Court's Judgment dismissing the action was entered on March 23, 1989. App. 107-111.

---

[1] The action that is the subject of this appeal was dismissed at the pleading stage and before any answer was filed. The facts alleged in the Complaint are the facts of the case for the purposes of this appeal.

A Notice of Appeal was filed on April 4, 1989. The jurisdiction of the Court of Appeals for the Seventh Circuit was invoked pursuant to 28 U.S.C. Sec. 1291. On May 8, 1991 the Court of Appeals entered its opinion, order and judgment vacating the Judgment of the District Court and remanding the case to the District Court for further proceedings under the Federal Tort Claims Act. App. 101-106.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS CONTRARY TO THE UNAMBIGUOUS MANDATE OF 28 U.S.C. SEC. 2780.

28 U.S.C. Secs. 2671 through 2680, inclusive, constitute 28 U.S.C. Ch. 171, which also is known as the Federal Tort Claims Act. Generally speaking, this Federal Tort Claims Act defines and limits the consent of the United States to be sued in tort for the negligent acts and omissions of its employees.

The Federal Tort Claims Act, however, does not apply to all torts that may be committed by Federal Government employees. The United States expressly has not given its consent to be sued for certain torts that may be committed by its employees, including those that involve the intentional infliction of injury on other persons. With respect to such torts the language of the Federal Tort Claims Act is clear and unambiguous:

"The provisions of this chapter and section 1346(b) of this title shall not apply . . . ." 28 U.S.C. Sec. 2680.

This exception to the application of the Federal Tort Claims Act applies to *all* of the provisions of the Act, not just to selected provisions. It applies to 28 U.S.C. Ch. 171 in its entirety. None of the provisions of 28 U.S.C. Secs. 2671 through 2680 can have any application in a case that falls within an exception to the application of the Federal Tort Claims Act.

The case at hand falls within an exeption to the Federal Tort Claims Act, in particular, the exception expressly provided for the intentional torts that may be committed by Federal Government employees. 28 U.S.C. Sec. 2680(h). In a case such as this one, in which the causes of action alleged in the Complaint are grounded in the common law torts of libel and intentional interference with employment contract rights, the provisions of the Act, 28 U.S.C. Secs. 2671 through 2780, inclusive, "shall not apply". 28 U.S.C. Sec. 2780.

In reaching its decision in this case the Seventh Circuit Court of Appeals disregarded the mandate of 28 U.S.C. Sec. 2680(h). Instead, it concentrated on whether the administrative scope-of-employment certification provided for at 28 U.S.C. 2679(d)(1) is subject to judicial review. App. 103-105. In other words, the Court of Appeals "put the cart before the horse", and, instead of concentrating on *whether* the provisions of the Federal Tort Claims Act apply in this case, it focused on *how* they apply here. In the process, the Court of Appeals missed the mark.

The language of 28 U.S.C. Sec. 2680(h) is clear and unambiguous: in a case such as this, where the causes of action alleged in the Complaint concern intentional torts committed by persons who happen to be Federal Government employees, the provisions of the Federal Tort Claims Act, 28 U.S.C. Secs. 2671 through 2680, including the administrative scope-of-employment certification provided for at 28 U.S.C. Sec. 2671(d)(1), "shall not apply". Where, as here, the language of a statute is clear and unambiguous, that language should be given effect. E.g., *United States v. James*, 478

U.S. 597, 606 (1986). The failure of the Court of Appeals to do so in this case was error.[2]

II. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE PURPOSE OF THE FEDERAL TORT CLAIMS ACT, AS WELL AS INCONSISTENT WITH THE LEGISLATIVE INTENTION BEHIND 28 U.S.C. SEC. 2679.

The significance of the decision of the Seventh Circuit Court of Appeals is not limited to the causes of action that have been alleged in the Complaint that is at issue in this case. The application of the reasoning of the Court of Appeals in this case is not limited to the particular persons who happen to be the parties here. The decision of the Court of Appeals in this case applies to every case in which an individual has alleged that he or she has been assaulted, battered or otherwise injured as a result of an intentional tort committed by a person who is an employee of the Federal Government.

What the Court of Appeals has held in this case is that an employee of the Federal Government who has committed any of the intentional torts enumerated at 28 U.S.C. Sec. 2680(h) is absolutely immune from having to answer for his conduct, provided only that it administratively is certified that he was acting within

---

[2]At least two other Circuits have applied this same questionable logic. *Nasuti v. Scannell,* 906 F.2d 802, 814 (1st Cir. 1990); *Mitchell v. Carlson,* 896 F.2d 128, 136 (5th Cir. 1990). Another Circuit also appears to have done so, although the basis for its decision is somewhat ambiguous because the Government itself, in the person of several of its departments, was a named party from the very beginning of the lawsuit. *Aviles v. Lutz,* 887 F.2d 1046, 1048-1049 (10th Cir. 1989). Although it has had opportunity to address the application of the Federal Tort Claims Act in a case where another statute has provided the basis for the Government being substituted as a party in a lawsuit, see below at 9-11, the Supreme Court has not heretofore had occasion to consider the issue presented in this case, where the only basis for the substitution of the Government as a party is the Federal Tort Claims Act itself.

the scope of his employment when he committed the tort and that said certification passes judicial review. The corollary of this, of course, as pointed out by the Court, App. 105-106, is that in such a case, because the United States has not consented to be sued for such torts, see 28 U.S.C. Sec. 2680(h), the victim of the intentional tort will have no opportunity to present evidence to a jury and will be foreclosed from having any remedy whatsoever for his or her injury.

Given that even outrageous conduct, under certain circumstances, may be found to have been within the scope of the perpetrator's employment, e.g., *Graham v. Sauk Prairie Police Commission*, 915 F.2d 1085, 1095 (7th Cir. 1990) (victim murdered by mentally ill police officer); *Hibma v. Odegaard,* 769 F.2d 1147, 1150-1151 (7th Cir. 1985) (victim framed for burglaries by sheriff's deputies and imprisoned); *Bell v. City of Milwaukee*, 536 F. Supp. 462, 478 (E.D. Wis. 1982) (wrongful shooting and killing of victim covered up by police officers), the significance of the decision of the Court of Appeals is that the victims of even outrageous, intentional conduct on the part of Federal Government employees may have no recourse or remedy whatsoever for their injuries. It is submitted that such a result is inconsistent with the fundamental purpose of the Federal Tort Claims Act, which is to provide a remedy, albeit a limited one, for persons who have been injured by Federal Government employees, and not to leave such persons in a worse position than they would have been in had the law not been enacted.

Such a result also would be contrary to the legislative intention behind 28 U.S.C. Sec. 2679. 28 U.S.C. Sec. 2679 was amended, to provide for the administrative scope-of-employment certification that is in question here, by the Federal Employees Liability Reform and Tort Compensation Act of 1988, Public Law 100-694. This law was enacted in response to the decision of the Supreme Court in *Westfall v. Erwin*, 108 S. Ct. 580, 585 (1988), which had held that Federal Government employees were shielded from State tort liability only where they acted within the scope of their employment *and* their actions were discretionary in nature.

Concerned that the second condition — that the action in question involve the exercise of discretion, would have its "most severe impact on lower-level employees . . . who are least likely to exercise discretion in carrying out their duties", and noting the run-of-the-mill *negligence* that might expose them to liability in tort, House Report No. 100-700 [to accompany H.R. 4612] at 3 (June 14, 1988), App. 122, the Congress responded to the *Westfall* decision by enacting Public Law 100-694.

In enacting Public Law 100-694 the Congress stated that the "functional effect" of the new law,

". . . . is to return Federal employees to the status they held prior to the *Westfall* decision. That is, Federal employees will be immune for personal liability for actions taken in the course and scope of their employment . . . ." House Report No. 100-700 at 4. App. 123.

The Congress further explained its enactment of the new law as follows: –

". . . . H.R. 4612 provides that the United States will incur vicarious liability only for the common law torts of its employees which are committed within the 'scope of their employment.' *If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant,* and the individual employee remains liable . . . ." House Report No. 100-700 at 5. App. 124.

In short, contrary to the decision of the Court of Appeals in this case, it was not the intention of the Congress that the adminstrative scope-of-employment certification provided for at 28 U.S.C. Sec. 2679(d)(1) should apply in a case where it is alleged that a Federal Government employee is guilty of "egregious misconduct", such as the intentional torts enumerated at 28 U.S.C. Sec. 2680(h).

III. THE DECISION OF THE COURT OF APPEALS IN THIS CASE RELIED ON CASE LAW THAT DOES NOT APPLY HERE.

Having considered how the provisions of the Federal Tort Claims Act apply in this case, the Circuit Court of Appeals concluded that, if, following a judicial review, it is determined that the Defendants properly were certified to have been acting within the scope of their employment, as provided for at 28 U.S.C. Sec. 2679(d)(1), when they committed the intentional torts that are the subject of the Plaintiffs' Complaint, then this matter is governed by the decision issued by the Supreme Court in *United States v. Smith,* 111 S.Ct. 1180 (1991). App. 105. The Court of Appeals' reliance was misplaced.

The case of *United States v. Smith* is different from the case at hand in at least one critical respect. In *United States v. Smith* the cause of action alleged in Mr. and Mrs. Smith's Complaint had been a cause of action for medical malpractice, which malpractice was said to have been committed by a Dr. William Marshall while employed at a United States Army hospital in Italy. Their lawsuit was governed by the Gonzalez Act, 10 U.S.C. Sec. 1089. The instant case, in contrast, does not involve any application of the Gonzalez Act.

In pertinent part, the Gonzalez Act provides as follows:

"Upon a certification by the Attorney General that [a physician accused of malpractice] was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding . . . shall be . . . deemed a tort action brought against the United States under the provisions of title 28 and all references thereto . . ." 10 U.S.C. Sec. 1089(c).

The question presented to the Supreme Court in *United States v. Smith* was whether a medical malpractice action that arose in a foreign country, that was deemed to be "a tort action brought

against the United States" by the operation of 10 U.S.C. Sec. 1089(c), could be maintained against the Doctor as an individual, notwithstanding the exclusive remedy provisions of the Federal Tort Claims Act and 28 U.S.C. Sec. 2680(k), which bars such actions against the Federal Government when they arise in a foreign country.[3]

The critical difference between the situation presented in *United States v. Smith* and the case at hand is that the lawsuit in question in the former case was "deemed a tort action brought against the United States" by the operation of 10 U.S.C. Sec. 1089(c), independent of anything that the Federal Tort Claims Act might have said about the substitution of the United States as the Defendant in the case. Unlike the case at hand, the Federal Government's status as a party to the suit did not depend on the application of any provision found in 28 U.S.C. Secs. 2671 through 2680, the Federal Tort Claims Act. For the purpose of considering how the various provisions of the Federal Tort Claims Act might apply, the Federal Government already was established as the proper Defendant in the case, by the operation of 10 U.S.C. Sec. 1089(c).

In the instant case, however, the Government's status as a party to the lawsuit depends on whether 28 U.S.C. 2679(d)(1) applies. There is no other basis for the substitution of the United States

---

[3]The Supreme Court's decision in *United States v. Smith*, 111 S.Ct. 1180, resolved a conflict between the Circuits concerning the relationship of the Gonzalez Act to the Federal Tort Claims Act. Compare *Smith v. Marshall*, 885 F.2d 650, 655 (9th Cir. 1989), *Newman v. Soballe*, 871 F.2d 969, 971-972 (11th Cir. 1989) and *Pelphrey v. United States*, 674 F.2d 243, 246 (4th Cir. 1982), with *Powers v. Schultz*, 821 F.2d 295, 297 (5th Cir. 1987). The instant case does not involve the Gonzalez Act in any way.

as the Defendant in this lawsuit, other than by the operation of 28 U.S.C. Sec. 2679(d)(1). If 28 U.S.C. Sec. 2679(d)(1) has no application here, as has been discussed, because the causes of action in question fall within the exeption to the application of the Federal Tort Claims Act that is found at 28 U.S.C. Sec. 2680(h), then there is no legal basis for the Government's participation as a party in the lawsuit.

Unlike the situation addressed by the Supreme Court in *United States v. Smith*, 111 S.Ct. 1180, there is no basis for the Government's participation as a party in the case at hand, none that is independent of the provisions of the Federal Tort Claims Act itself. Where, as here, those provisions do not apply, 28 U.S.C. Sec. 2680(h), there is no occasion to consider the application of the exclusive remedy provisions of that Act and how they might relate to some other statute. The Court of Appeals overlooked this critical distinction and its reliance on the Supreme Court's decision in *United States v. Smith* was misplaced.

CONCLUSION

The administrative scope-of-employment certification provided for at 28 U.S.C. Sec. 2679(d)(1) is an integral part of the Federal Tort Claims Act and, necessarily, only can have application where the Act itself applies. In those cases where 28 U.S.C. Sec. 2680 states that the provisions of the Federal Tort Claims Act "shall not apply", 28 U.S.C. Sec. 2679(d)(1) can have no application. This would seem to be elementary.

Unlike the situation addressed by the Supreme Court in *United States v. Smith*, 111 S.Ct. 1180, there is no legal basis for the substitution of the United States as a Defendant in the instant lawsuit, at least none that is independent of the provisions of the Federal Tort Claims Act itself. The provisions of the Federal Tort Claims Act, however, "shall not apply" and do not apply in a case such as this case, where the causes of action alleged in the Plaintiffs' Complaint fall within the exception to the application of the Act that is found at 28 U.S.C. Sec. 2680(h).

The decision of the Seventh Circuit Court of Appeals in this case, that is to the contrary, would establish the anomalous proposition that persons who are injured as a result of the negligent acts or omissions of Federal Government employees will find an adequate remedy, while those who are injured as a result of the intentional torts that may be committed by such employees would have no recourse or remedy at all. The Supreme Court has not had occasion before now to consider the issue presented in this case. The opinion, order and judgment of the Court of Appeals below, and their policy implications, should be reviewed by the Supreme Court. The writ requested should be allowed.

Respectfully Submitted,
LAWTON & CATES, S.C.

BRUCE F. EHLKE
Attorney of Record
214 West Miffin Street
Madison, Wisconsin 53703
(608) 256-9031
Attorney for Hamrick, Grosz,
Fischer, Filip and Carter